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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-358

CORAL DRILLING, INC., ET AL.,
Respondent,

versus

CHARLES L. BISHOP,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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OPINION OF THE COURT BELOW

The opinion of the Chancery Court of the First Judicial District of Jones County Mississippi is published but unreported and is attached as Appendix No. 1. The opinion of the Supreme Court of Mississippi is published and reported at 260 So.2d 463 and is attached as Appendix No. 2.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The original judgment of the Supreme Court of Mississippi was rendered April 10, 1972. A Petition for Rehearing was filed and denied on June 5, 1972. The

jurisdiction of this Court is invoked by petition for writ of certiorari for review of the decision of the highest court of a State pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED FOR REVIEW

Is a state jurisprudential application of the doctrine of election of remedies which denies an injured party a judgment secured against the actual tortfeasor on the grounds that a prior suit against a nontortfeasor growing out of the same incident resulting in a settlement and covenant not to sue with reservation of rights of the injured party against the actual tortfeasor a denial of due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE

On March 31, 1969, Charles L. Bishop was restoring telephone service to a residence on Highway 528 near Bay Springs, Mississippi. The job required him to string wire across the highway and to secure it by standing on a telephone pole adjacent to the highway. In the neighborhood, G. B. "Boots" Smith, Inc. was moving oil field drilling equipment by truck for Coral Drilling, Inc. from one drilling site to another. The line which Bishop was repairing had been previously knocked down by Smith.

As the equipment was being moved, a caravan of four trucks was formed, the third in line being a Coral

Drilling, Inc. truck driven by its employee, Robert Reeves.

As the truck caravan was passing the pole on which Bishop was standing, one of the trucks struck the telephone line and shook Mr. Bishop to the ground causing him injuries resulting in his being rendered a paraplegic.

Bishop filed suit in the Circuit Court of the Second Judicial District of Jasper County Mississippi against G. B. "Boots" Smith, Inc. as servant of Coral Drilling, Inc. and Coral Drilling, Inc. as master for his injuries. Appendix No. 3. There was no allegation that they were joint tortfeasors. That suit resulted in a voluntary dismissal without prejudice in favor of Coral Drilling, Inc. and a limited release and covenant not to sue in favor of G. B. "Boots" Smith, Inc. in consideration of a payment of $90,000.00. Appendix No. 4. Coral Drilling, Inc. was not a party to the covenant not to sue and paid nothing. B. G. "Boots" Smith, Inc. specifically denied liability.

Sometime after the accident it was discovered that there was a Coral Drilling, Inc. truck in the caravan driven by a Coral employee and that indeed it was this truck which struck the wire causing Bishop's injuries. Bishop then filed suit by attachment in Chancery in the Chancery Court of the First Judicial District of Jones County, Mississippi against Coral Drilling, Inc., its driver, Robert Reeves and several garnishee-defendants. Coral Drilling, Inc. answered and pled in bar the election of remedies by Bishop in granting the

covenant not to sue for a consideration from G. B. "Boots" Smith, Inc.

Upon trial of the matter, the Chancelor found that the Coral Drilling, Inc. truck had indeed struck the wire and negligently caused Bishop's injury and awarded damages of $350,000.00 with a credit of $90,-000.00 for the settlement from G. B. "Boots" Smith, Inc.

The Chancery Court specifically held that there were not two inconsistent remedies from which one might elect since in fact there was only one tortfeasor and thus one remedy.

On appeal to the Supreme Court of Mississippi, that Court reversed the Chancery Court and dismissed the bill of complaint on the grounds that Charles L. Bishop had elected his remedy by bringing suit against G. B. "Boots" Smith, Inc. and granting a covenant not to sue for a consideration.

The federal issue was raised by Petition for Rehearing, Appendix No. 5. The Petition was denied by the Supreme Court of Mississippi on June 5, 1972. Appendix No. 6.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A state court's interpretation of its tort law may result in infringement upon rights protected by the United States Constitution. *Levy v. Louisiana*, 391 U.S. 68; *Glona v. American Guarantee & Liberty Insurance*

Co., 391 U.S. 73. "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution provides. . . ." *Hansberry v. Lee*, 311 U.S. 32. The doctrine of election of remedies has the same force and effect as res judicata. cf. 25 Am.Jur. 2d *Election of Remedies*, §6 p.651. Furthermore, the doctrine of election of remedies is procedural rather than substantive. *Bernstein v. United States* (10 Cir.) 256 F.2d 697 cert. dismd. 358 U.S. 924. "[W]here the state ground is purely procedural, the Supreme Court will not hesitate to act upon fundamental constitutional right, unless the state's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry v. Williams* (N. D. Miss.) 299 F.Supp. 36 at 44.

Having granted the right to recover for negligent injury, a State must apply that law with due regard for federal constitutional guarantees. See *Levy v. Louisiana*, supra. In the instant case, Charles L. Bishop has secured a judgment for negligent injury against the one and only tortfeasor who caused him injury.

Prior thereto, he mistakenly sued a non-tortfeasor who was, at that time, prepared to purchase his peace for $90,000.00. The fact of the liability of Coral Drilling, Inc. and the fact of the damages in the amount of $350,000.00 are no longer open to question or review. Bishop has asserted his one and only remedy against the sole tortfeasor and been given judgment.

It is respectfully submitted that the application of the oft-criticized doctrine of election of remedies, see 25 Am. Jur. 2d *Election of Remedies*, §3 p. 648, arbitrarily denies to Charles Bishop a right otherwise granted to him by the State of Mississippi. Coral Drilling, Inc. has suffered no other exposure than that otherwise conferred by Mississippi law. To bind Charles Bishop as against Coral Drilling, Inc. as a result of a covenant between Bishop and G. B. "Boots" Smith, Inc. to which Coral Drilling, Inc. was not a party is as clear a denial of due process as the purported binding effect of the prior judgment on the landowners in *Hansberry v. Lee*, supra.

The procedural rule established by the Supreme Court of Mississippi in the instant case denies to Charles Bishop the one thing all other Mississippians are guaranteed — a day in court and full recompense for damages. By this procedural rule, a covenant freely entered into between two parties conveys rights of immunity on a party which the contracting parties specifically intended to exclude. It is respectfully submitted that the instant application of the doctrine of election of remedies raises serious federal issues

of due process of law and equal protection of the laws which should be examined by this Honorable Court.

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On The Petition for
Writ of Certiorari

CERTIFICATE

I certify that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi has been served upon Gibbes, Graves, Mullins & Bullock and Marvin Oats, by mailing the same to each properly addressed and postage prepaid on this ____ day of _____, 1972.

JOHN R. MARTZELL

APPENDIX NO. 1

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF JONES COUNTY, MISSISSIPPI

CHARLES BISHOP,
COMPLAINANT,
VERSUS NO. 6312

CORAL DRILLING COMPANY, ET AL.,
DEFENDANTS.

OPINION OF THE COURT

This cause is before the Court on a Bill of Complaint, being an attachment in Chancery, together with the answer and affirmative defenses of the defendants. The Court has heard all of the evidence offered by the parties, together with briefs of counsel. After a consideration of all of the pleadings, evidence and briefs of counsel, the Court is of the opinion and doth find as follows:

That during the morning of March 31, 1969, at approximately 10:00 A. M., the Complainant, Charles L. Bishop, an employee of the Bay Springs Telephone Company, was engaged in the replacing of a wire across Highway 528 near the Blakeney residence in Jasper County, Mississippi. At the time Bishop was near the top of the telephone pole securing the wire to the top of the pole. His supervisor, McDevitt, was on

the ground and was not actively helping secure the wire at the time of the accident.

On the same morning a drilling rig was being moved from one location to another location by three trucks owned by G. B. "Boots" Smith and one truck owned by the defendant, Coral Drilling, Inc., and being driven by the defendant, Robert Reeves, an employee of Coral Drilling, Inc. The Route traveled by the trucks was along the same highway, No. 528, where Bishop was working. The order in which the trucks left the old drill site, loaded with oil well drilling equipment, was as follows: The first two trucks to leave the site were G. B. "Boots" Smith vehicles, the third truck was the Coral Drilling vehicle, and the fourth truck was a G. B. "Boots" Smith vehicle. The trucks traveled along Highway 528 in that order and arrived at the new drill site in that order. The trucks began to leave the old drill site at approximately 8:00 A. M. and proceeded at regular intervals, but not together, to the new drill site. The driver of the first truck saw Bishop working at a different location but along the same route. The driver of the second truck saw Bishop working on the pole at the site of the accident. The driver of the third says he saw nothing. The driver of the fourth truck saw Bishop lying on the ground at the pole after the accident had happened.

Bishop was replacing a wire across the road. The wire was more than seventeen feet in height above the traveled portion of the road. One of the trucks struck the wire while Bishop was atop the pole, caus-

ing the pole to "whip" and Bishop to fall, causing Bishop extensive injuries.

The truck driven by Reeves was a regular tandem float type unit, while those which preceded him were lowboys and were lower in height, both loaded and unloaded, than the Coral Drilling unit. The Coral truck was loaded with part of a mud tank with a light extended above. Some distance down the road, after passing the scene of the accident, the driver of the Coral truck stopped to check the condition of his truck. At that time the driver's helper removed from the top of the load a telephone wire similar to the one Bishop was using. The wire had not been caught on the mud tank when the truck left the old site.

Bishop testified that before he was knocked unconscious, and while still atop the pole, he heard the truck coming and could identify it as the Coral truck. McDevitt testified for the defendant that he saw the truck and it was the fourth truck to pass the scene and that it was a G. B. "Boots" Smith truck. McDevitt's testimony for the defendant is contradicted to some extent by another witness for the defendant, F. E. Blakeney. Blakeney testified by way of deposition that at the scene of the accident McDevitt said to him, as another truck, this one a G. B. "Boots" Smith truck went by, "There goes another one just like it." This statement was made within a few short minutes of the accident. Obviously if McDevitt had originally seen the fourth truck, instead of the third truck, strike the wire, he and Blakeney could not have seen another one go by since the fourth truck was the last one and there

would have been no others. Also, because of the order of travel of the trucks, the only G. B. "Boots" Smith truck to have been followed by another G. B. "Boots" Smith truck was the first. No evidence even suggests that it was the first truck of the four. It must be assumed that in the excitement and confusion of the serious accident and the witness McDevitt's concern for Bishop that he became confused as to the truck that struck the wire.

Even if the Court were to discount substantially the testimony of Bishop because of his condition immediately after the accident, and taking into consideration the conflict in McDevitt's testimony and that of Blakeney, both witnesses for the defendant, the physical facts, the order of travel, the finding of the wire on the Coral truck, the testimony of the other truck drivers, the Court is convinced and does so find by a preponderance of the evidence, that the Coral Drilling, Inc. truck, driven by Robert Reeves, struck the wire causing the injury to the Complainant.

Section 8267 of the Code provides as follows:

"(A) No vehicle unladen or with load shall exceed a height of thirteen (13) feet six (6) inches. Provided, however, that no person, firm or corporation, nor the State of Mississippi or any subdivision thereof, shall be required to raise, alter, construct or reconstruct any underpass, wire, pole, trestle, or other structure to permit the passage of any vehicle having a height, unladen or with load, in excess of twelve (12) feet six (6) inches; and provided further that full liability for

damage to any structure caused by any vehicle having a height in excess of twelve (12) feet six (6) inches shall be borne entirely by the motor carrier or operator of the vehicle."

The Court finds from the evidence that the Coral Drilling, Inc. truck was negligently loaded to an excessive height and that the wire was properly installed across the road.

After hearing the evidence, the Court is further of the opinion that had the driver of the Coral Drilling, Inc. truck kept a proper lookout, he would have been able to see the wire across the road and the man working on the road and should have known that his vehicle would strike the wire as it passed. By keeping a proper lookout he would have observed the danger at a sufficient distance away to have stopped prior to the striking of the wire and thereby avoided the danger and injury.

The Court finds that the sole, proximate cause of the accident and the injuries received by the complainant was the negligence of the defendant, Coral Drilling, Inc., and Robert Reeves, in exceeding the legal height for loaded vehicles and in failing to keep a proper lookout.

The Court is further of the opinion that objection to Exhibit 10 for Identification should be sustained. "A majority of the states follow the rule that such codes (government safety codes and regulations) are admissible only when they have been given compulsory

force by the state legislatures... Mississippi has followed the majority rule for a number of years and we think properly so. . . ." *Catholic Diocese of Natchez-Jackson v. Jaquith*, 224 So. 2d 216 (1969). In view of the above quoted Code Section regulating the height of loaded trucks and the above cited case, the objection should be sustained.

In view of the above findings of fact, it is now necessary to consider the "Plea in Bar" filed by the defendants alleging Bishop to have been fully and adequately compensated for all injuries as a result of a Circuit Court action in Jasper County in which both Coral Drilling, Inc., and G. B. "Boots" Smith were sued. In that proceeding prior to any adjudication on its merits, Bishop took a voluntary nonsuit, without prejudice, as to Coral Drilling, Inc., and settled all claims against Smith for $90,000.00. No general release was given but a covenant not to sue Smith was given. The entire court proceeding has been introduced into evidence. The facts as alleged in that Declaration were essentially the same as in this case except the driver of the vehicle was alleged to be unknown, but was alleged to be in the furtherance of the business of both G. B. "Boots" Smith and Coral Drilling, Inc. In the order approving the third party settlement it is adjudged that:

"3. The Court further finds that it has not been legally or judicially determined as to what company or party was responsible for or caused the said accident, and that this is a case of disputed liability. . . ."

Although it has not been specially plead as a defense, the defendants have argued the doctrine of "Election of Remedies". Because of the questions raised, the Court has taken the Plea in Bar as raising this defense. As stated in *Edwards v. Edwards*, 11 So. 2d 450 (1943); *Simpson v. City of Gulfport*, 121 So 2d 409 (1960) and *O'Briant v. Hull*, 208 So. 2d 784 (1968): "The doctrine of election of remedies has been carefully limited in this state, and is usually not applied where there is some reasonable doubt as to the correct method, or there is a mistake which has prejudiced no one."

Obviously unless there was a factual situation which established Smith and Coral as joint tort feasors, they could not be sued jointly to a successful conclusion. There certainly was a reasonable doubt as to the proper procedure in this case. Smith apparently felt there was some doubt as to his liability, but rather than risk trial on such extensive damages, he settled. Would then the settlement by Smith inure to the benefit of Coral Drilling, Inc., the party ultimately proved to be responsible for the accident? Coral took no part therein nor paid any portion thereof so far as this record shows. To so hold, indeed, would be harsh and inequitable, and, in fact, provide a windfall for the wrongdoer. Coral did not in any way show it has been prejudiced by the previous suit and settlement, but only seeks an unjust gain as a result of it. To apply the doctrine in this case violates all legal and equitable principles. The Plea in Bar is, therefore, denied.

As a direct and proximate result of the negligence of Robert Reeves and Coral Drilling, Inc. the complainant was rendered totally and permanently disabled with a total loss of use of his lower extremities. He is paralyzed from the waist down, resulting in loss of control of all bowel and kidney functions. He is totally and permanently sexually impotent. The only movement of which he is capable is very limited and then only with the aid of burdensome and cumbersome supports and braces. He is in need of constant assistance and nursing. He has no hope of improvement. At the time of the accident he was thirty-seven years old, married and the father of one child. He can have no other children. At best he is a burden on himself and his family.

Based on his age, past earnings and future wage earning capacity, total disability, permanent paraplegia, loss of all bowl and kidney functions, sexual impotency, past and future pain and suffering, past and future hospital, medical and nursing care and expenses, the Court is of the opinion that the Complainant has suffered damages in the amount of $350,-000.00.

This being a court of equity, the Court is of the opinion that, to prevent double payment for damages, it would be proper to deduct from the total damages the amount received in settlement. Therefore, the Court finds for the Complainant against Robert Reeves and Coral Drilling, Inc., in the amount of $260,000.00.

A decree may be drawn accordingly.

Filed 8:00 A.M. Mar. 30, 1971
LEONARD B. CAVES
Chancery Clerk
Jones County, Miss.

APPENDIX NO. 2

IN THE SUPREME COURT OF MISSISSIPPI

CORAL DRILLING, INC., ET AL.

VERSUS NO. 46,600

CHARLES L. BISHOP

GILLESPIE, CHIEF JUSTICE:

This is an appeal from the Chancery Court of the First Judicial District of Jones County, Mississippi. Charles L. Bishop sued Coral Drilling, Inc. (Coral), then a nonresident corporation, and its driver, Robert Reeves, for personal injuries sustained when complainant fell from a telephone pole. The fall resulted in Bishop being totally and permanently paralyzed from the waist down. The chancery court found that Bishop had sustained damages in the amount of $350,000, but gave credit for $90,000 theretofore paid by G. B. "Boots" Smith, Inc. (Smith). Judgment was en-

tered against Coral in the amount of $260,000. The suit was filed in chancery court as an attachment in chancery because of the nonresidence of Coral and the fact that certain resident defendants were indebted to Coral. The principal question involves the doctrine of election of remedies. We hold that complainant was bound by his former suit wherein he charged Smith as the negligent party and settled that suit for the sum of $90,000.

On March 31, 1969, Bishop was engaged in restoring telephone service to the residence of F. E. Blakeney on Highway 528, a short distance from Bay Springs, Mississippi. He had been employed only a few days by the Bay Springs Telephone Company when he was injured. He and Leo McDevitt, an experienced employee of the telephone company, went to the Blakeney residence to replace a telephone wire that had been struck by a Smith truck the day before. Smith had numerous trucks operating in the area hauling oil field equipment. When Bishop and McDevitt reached the Blakeney residence, Bishop climbed the telephone pole which was south of the highway across the road from the Blakeney residence. In order to restore the telephone service it was necessary to replace the insulated wire across the road. After Bishop made the connection on the telephone pole south of the road, he descended the pole and rolled off enough wire on the ground and then climbed the pole on the north side of the road. He pulled the wire tight to a height of about seventeen feet, made the proper connections, and was preparing to descend the pole when he saw a truck approaching, which he stated he watched for about

forty yards. His spurs were driven into the pole and he leaned back against his safety belt anticipating a possible collision. The load on the truck struck the wire which he had just installed, causing the pole to whiplash at the top and strike Bishop in the head. He fell to the ground and was injured.

Bishop first filed suit in the Circuit Court of the Second Judicial District of Jasper County, Mississippi, against Smith and Coral, but not as joint tort feasors. Coral was joined in that suit on the allegation that Smith was in the furtherance of the business of Coral on the theory of master and servant. The declaration alleged that Smith was moving a drilling rig on one of its trucks and the height of the load was in excess of eighteen feet above the road surface in violation of the statutes of the State of Mississippi regarding heights of laden motor vehicles, and that said laden truck struck the telephone wire that caused the pole on which Bishop was working to bend toward the center of the road and snap back resulting in plaintiff's fall and injury.

In connection with the suit in circuit court, Coral propounded certain interrogatories to Bishop, No. 32 of which asked the plaintiff to identify the color and type of the large truck and trailer owned by Smith. Bishop answered under oath it was "A large red truck." Bishop swore to these interrogatories on the fifteenth day of February, 1970, and on the twenty-sixth day of February, 1970, Bishop dismissed the suit without prejudice as to Coral. On March 5, 1970, a judgment was entered in the Circuit Court of the Second Judicial

District of Jasper County, approving a settlement of the litigation of Bishop against Smith for $90,000, to be distributed to Bishop, his attorneys, and Fidelity and Guaranty Underwriters, Inc., the workmen's compensation carrier of Bishop's employer who had intervened in the suit. The judgment also authorized the parties to execute all acquittances and discharges to complete the purpose of settlement. Pursuant thereto Bishop executed a covenant not to sue Smith. Coral was not a party to the proceedings since it had been previously dismissed from the suit. The judgment recited that the defendant Smith denied liability but recognized the severity and permanent nature of the injuries of the plaintiff and because of the uncertainty of the litigation offered $90,000 to purchase its peace in the premises and bring an end to the litigation against it.

After settlement of the suit against Smith, the present suit was begun in the Chancery Court of the First Judicial District of Jones County, wherein it was alleged by Bishop in a sworn bill of complaint that he was injured as stated in the previous suit except that the telephone wire was struck by a truck belonging to Coral Drilling, Inc., and driven by Robert Reeves. At the trial in chancery court, Bishop testified that the truck which struck the wire was a tandem truck loaded with a mud tank, that its color was blue and had a white sign on the door, but that all he could make out of the name was "Coral."

The first question raised by Coral's assignments of error is whether the doctrine of election of reme-

dies precluded Bishop from prosecuting the second action against Coral. This question has two points of inquiry: (1) Was it properly pleaded, and (2) does the doctrine apply to the circumstances involved in this case?

1. Coral's answer stated that Bishop had been fully compensated by the payment of $90,000 by G. B. "Boots" Smith, Inc.; that Bishop filed suit in the Circuit Court of the Second Judicial District of Jasper County, stating the names of the parties, and that the declaration alleged that a large truck and trailer owned and operated by G. B. "Boots" Smith, Inc., struck the telephone line in question, causing plaintiff's injuries and damages; and that the suit was settled by payment of $90,000 by Smith. The chancellor considered this statement in Coral's answer under the heading of "Plea in Bar" as raising the defense of election of remedies, but denied its application. We are of the opinion that the answer sufficiently raised the defense. It stated the facts concerning the issue of election of remedies and the proof of the former suit against Smith was admitted in support thereof. It is not necessary to designate a part of the answer by any particular terminology so long as the issue is raised by stating the facts. Mississippi Chancery Practice, Griffith, § 360, p. 344 (1950).

2. Bishop first sued Smith and swore to his answer to an interrogatory that the Smith truck[1] was "A large

[1]There can be no doubt that the truck referred to in his answer was the same G. B. "Boots" Smith, Inc. truck referred to in the declaration as being the one that caused his injuries.

red truck."[2] The suit was thereafter settled for $90,000. Bishop then filed the present suit in another court and swore to a bill of complaint that it was a Coral Drilling, Inc., truck that struck the wire, and caused him to fall from the telephone pole. Moreover, he testified in the second suit that the color of the truck that struck the wire was blue and had a sign on the side containing the word "Coral."

This case is controlled by *O'Briant v. Hull*, 208 So. 2d 784 (Miss. 1968), and the authorities therein discussed. As succinctly stated in *O'Briant*, the difficulty here is that one action alleges what the other action denies, and the facts necessary to support one remedy are inconsistent with those necessary to support the other. (208 So.2d at 787). The case now before the Court has an additional element not present in *O'Briant* in that Bishop, in the chancery court suit, swore to facts contrary to what he had sworn in the former suit. The two remedies Bishop sought to pursue are totally inconsistent; either a Smith truck struck the wire, or a Coral truck struck it. "The compromise and settlement of a suit constitutes such an election as will preclude plaintiff from thereafter prosecuting an action based upon a theory inconsistent with that on which the former action was maintained." (208 So.2d at 787). Courts will not permit litigants to solemnly affirm that a given state of facts exists from which they are entitled to a particular relief, and then afterwards affirm, or assume, that a contrary state of facts

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[2]The proof showed that the G. B. "Boots" Smith, Inc., trucks were red, and Coral Drilling, Inc., trucks were blue.

exists from which they are entitled to inconsistent relief.

We hold that because Bishop prosecuted the suit against Smith to the extent of reaching a settlement based on the contention that a Smith truck caused his injuries, he was thereafter precluded from suing Coral for the same damages based on the contention that a Coral truck caused his injuries.

The doctrine of election of remedies determines this case and further discussion of Coral's assignment of errors is unnecessary. However, Coral's argument that Bishop was judicially estopped to maintain the second suit deserves comment. Although not sufficiently pleaded, a proper regard for the public policy that upholds the sanctity of an oath should require the court to take notice of this argument. Courts should on their own initiative preclude a party from repudiating in one suit a sworn statement made in support of former litigation.

For the reasons stated, the case is reversed and the bill of complaint is dismissed.

REVERSED AND RENDERED.

BRADY, PATTERSON, SMITH AND SUGG, JJ., CONCUR.

APPENDIX NO. 3

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT OF JASPER COUNTY, MISSISSIPPI

Charles L. Bishop,

Plaintiff,

versus No.

G. B. "Boots" Smith, Inc., Et Al,

Defendants.

DECLARATION

Comes now Charles L. Bishop, an adult resident citizen of Smith County, Mississippi, and files this his declaration against G. B. "Boots" Smith, Inc., a Mississippi corporation domiciled at 2501 Airport Drive, Laurel, Mississippi, who has designated G. B. Smith as its agent for process and whose address is that of the corporation above set forth; and Coral Drilling, Inc., a foreign corporation qualified to do business within the State of Mississippi and who has designated the C. T. Corporation System, 118 North Congress Street, Jackson, Mississippi, as its registered agent for process, and complaining says:

- 1 -

That the accident hereinafter complained of occurred in the Second Judicial District of Jasper County, Mississippi.

- 2 -

That the defendant G. B. "Boots" Smith, Inc., is engaged, among other businesses, in the business of transporting oil drilling rigs, and that the defendant Coral Drilling, Inc. is engaged, among other businesses, in the business of drilling oil wells.

- 3 -

That on or about March 31, 1969, the defendant G. B. "Boots" Smith, Inc., owned and was operating, by one of its drivers unknown to your plaintiff after diligent search and inquiry, a large truck and trailer used to transport drilling rigs. That on said date the defendant G. B. "Boots" Smith, Inc. was moving a drilling rig belonging to the defendant Coral Drilling, Inc. from a point south of the Town of Bay Springs, Mississippi eastward on Highway 528. That at all times herein complained of the driver of said truck was the agent and servant of the defendant G. B. "Boots" Smith, Inc., and was acting within the scope of his authority and in the furtherance of his master's business and in the furtherance of the business of the defendant Coral Drilling, Inc. That said truck was then and there transporting a part of the derrick of a drilling rig, and that the height of the load was in excess of 18 feet

above the road surface and was in violation of the laws of the State of Mississippi regarding heights of laden motor vehicles; and the violation of this applicable statute was a direct and proximate cause of the accident and resulting injuries and damages hereinafer complained of.

- 4 -

That on said date the plaintiff herein, who was then in the employ of Bay Springs Telephone Company, was in the act of replacing a telephone line across Highway 528 at a point approximately two miles east of the corporate limits of the Town of Bay Springs, Mississippi, at a point on said highway near the home of Edison Blakeney, which is located adjacent to said highway. That said telephone line had been recently severed by an excessively loaded truck, which necessitated its replacement. The plaintiff had stretched the said telephone wire from pole to pole across said highway and was in the act of securing it to the pole at a height in excess of 18 feet above the road surface. The laden truck of the defendant G. B. "Boots" Smith, Inc. was then and there traveling said Highway 528, and the portion of the drilling rig being then and there transported struck said wire at a height in excess of 18 feet above the road surface, causing the wire to be severed. That the pull of the wire caused the pole to which it was attached and on which the plaintiff was working at the time, to give or bend toward the center of the road. When the pole snapped back to an upright position it struck the head of the plaintiff, rendering him unconscious and causing him to fall to the ground

from a height of approximately 20 feet; and that this accident was the direct and proximate result of the gross negligence of the defendants as herein set forth. That at all times herein complained of the plaintiff was acting in a careful and prudent manner in the performance of such work. That the defendants at all times herein complained of were operating a laden motor vehicle on said Highway 528 in the State of Mississippi in violation of the laws of the State of Mississippi regarding the height of laden motor vehicles, and in a dangerous, grossly negligent, and careless manner, without regard to the rights of other persons on and along said highway.

- 5 -

That as a proximate result of the joint and concurrent gross negligence of the defendants, acting as aforesaid, the plaintiff was caused to be made sick, sore and lame, and to suffer severe fractures of the thoracic and cervical spine, to suffer pulled muscles and ligaments of the back and neck, shock to his nervous system, and caused to suffer great pain of mind and body. That the injuries received in such accident caused the plaintiff to have to undergo a laminectomy, which caused the plaintiff further severe pain of mind and body. That the plaintiff was confined in the Jones County Community Hospital for treatment of such injuries for a total of 67 days. Since being released from the hospital the plaintiff has been required to remain at home for the purpose of receiving further treatment, and continues to experience great pain of mind and body and will continue to experience such pain

of mind and body in the future. That plaintiff has incurred hospital, doctor, medical and medical appliance bills in the sum of $_____, and will be caused to incur future medical expenses. That the injuries suffered by the plaintiff are total and permanent. That the plaintiff has suffered to date loss of earnings; and because of the permanency of his injuries he is totally disabled, and is denied the opportunity to become gainfully employed either at this time or in the future.

- 6 -

As a direct and proximate result of the joint and concurrent gross negligence of the defendants as aforesaid, this cause of action hath accrued in favor of the plaintiff against the defendants for all items of damage, both actual and punitive, allowed by law for the injuries of the plaintiff, which said damages he alleges to be $420,000, for which he brings this suit and demands judgment accordingly, together with all costs.

CHARLES L. BISHOP,
PLAINTIFF

By: _____
His Attorney

APPENDIX NO. 4

LIMITED RELEASE, PURCHASE OF PEACE, COVENANT, AND RECEIPT

For and in consideration of the sum of $80,259.78, cash in hand paid, and the receipt of which is hereby acknowledged, paid to the undersigned parties and their attorneys, we, the undersigned Charles L. Bishop and wife Mrs. Charles L. Bishop, jointly and severally, and individually, do hereby now and forever, covenant and agree not to sue or molest G. B. "Boots" Smith, Inc., and any and all of its agents, servants, employees, and truck drivers who were employed by the said G. B. "Boots" Smith, Inc., and any and all legal entities and parties legally responsible for the use, maintenance, or ownership of any owned, non-owned, or leased vehicle then controlled by the said G. B. "Boots" Smith, Inc. and any and all of its agents, servants, employees, and truck drivers, who were employed by the said G. B. "Boots" Smith, Inc., at anytime during the month of March, 1969, at anytime during the first week of April, 1969, and especially on the date of March 31, 1969, and as to them only, to forthwith dismiss any and all suits or proceedings as may now or hereafter be pending upon, and to forever refrain from instituting, pressing, collecting, or in any way aiding or proceeding upon, any and all claims, demands, causes of action, suits, proceedings or adjudications whatsoever which the undersigned parties ever had, now have, or may have hereafter against the said G. B. "Boots" Smith, Inc. and its employees, or any of them so stated, against their estate or any legal representative what-

soever, for injuries, damage, expenses, loss of services or support, loss of consortium, and damages in any manner whatsoever heretofore or hereafter arising out of any matter, cause, or thing whatsoever, from the beginning and first day of the month of March, 1969, through and including the first week of April, 1969, and especially including the date of March 31, 1969, but without limitation of any of the foregoing, and related to and arising out of a certain accident, injury, and damages sustained by the undersigned Charles L. Bishop and the related claim of Mrs. Charles L. Bishop, when the said Charles L. Bishop was working on a telephone line and pole near Bay Springs, Jasper County, Mississippi, at or near Mississippi Highway No. 528, and when the said Charles L. Bishop fell to the ground and sustained extensive and permanent injuries to his back, neck, spinal cord, and other parts of his body, and causing him a substantial paralysis of a large part of his body, and including all matters and expenses related thereto. It is expressly understood and agreed that these presents may be pleaded by the covenantee G. B. "Boots" Smith, Inc. and its said specified employees, only, in bar of any and all suits or other proceedings whatsoever now pending or hereafter pending against the conventantees, in breach of this covenant. The undersigned parties do further represent and covenant to the said covenantees that they have not commenced any action against the covenantees on account of such matters, or any of them, other than Cause No. 1666 in the Circuit Court of the Second Judicial District of Jasper County, Mississippi, and that such action and suit has been, or will be forthwith, dismissed with prejudice.

It is further understood and agreed that the execution of these presents, and also the payment to the Workmen's Compensation insurance carrier having previously furnished benefits to the said Charles L. Bishop, being the Fidelity and Guaranty Insurance Underwriters, Inc., in the sum of $9,740.22, and further credit accruing to the benefit of the said subrogation workmen's compensation insurance carrier, all as a part of this consideration and further consideration herein, has been expressly approved by the Circuit Court of the Second Judicial District of Jasper County, Mississippi. The undersigned Mrs. Charles L. Bishop is executing these presents individually, severally, and jointly, and as a related claimant mentioned therein.

It is hereby expressly understood and agreed that the said considerations and payments have been received in full payment and purchase for this covenant not to sue; it is expressly understood and agreed that this instrument is not intended as a release or discharge of, nor as an accord and satisfaction with, any other person, firm, or corporation whatsoever, but only as a covenant not to sue and to the effect that the convenantees G. B. "Boots" Smith, Inc. and its said employees specified above, hereby purchase peace and are hereby given peace upon any and all claims and matters whatsoever which have been or may be made against the said covenantees by the undersigned parties and either and both of them; and that the covenantees, in making the payments of such considerations for these presents, have done so solely to obtain such peace and do not thereby admit any negligence or any liability whatsoever on account of any said claims or matters, but expressly deny all such liability and negligence

whatsoever, and are paying these payments and considerations because of the uncertainty of litigation and claims. It is expressly recognized and understood that the injuries and damages to the undersigned parties are so extensive that the payments mentioned above are not a full accord and satisfaction of such injuries and damages, but it is also recognized and agreed that liability against the said covenantees is doubtful and uncertain, and that the real liability, negligence, and responsibility for such injuries and damages and the proximate cause of them, appears to be upon persons, firms, and corporations other than the covenantees mentioned herein.

These presents have been expressly approved, after consideration and study, by the attorney of record for the undersigned parties.

IN WITNESS WHEREOF, we have hereunto set our hands upon this the 5th day of March, 1970.

(Signed) CHARLES L. BISHOP
CHARLES L. BISHOP

(Signed) MRS. CHARLES L. BISHOP
MRS. CHARLES L. BISHOP

APPROVED AND AGREED TO:

/s/ ROBERT McFARLAND
Honorable Robert McFarland,
Attorney for the Executing
Parties

STATE OF MISSISSIPPI

COUNTY OF JASPER

Personally came and appeared before me, the undersigned authority in and for the State and County afore-

said, the within named Charles L. Bishop and Mrs. Charles L. Bishop who each stated and represented that they and both of them are over the age of twenty-one years, and that they did sign, execute, and deliver the above and foregoing instrument on the day and year therein set forth, as their own free and voluntary acts and deeds, and for the intent and purposes therein stated.

WITNESS my signature and seal of office on this the 5th day of March, 1970.

(Signed) VIOLET R. WILSON
Notary Public

My Commission Expires:
Feb. 13, 1972

APPENDIX NO. 5

IN THE SUPREME COURT OF MISSISSIPPI

CORAL DRILLING, INC., A CORPORATION,
APPELLANTS,

versus NO. 46,600

CHARLES L. BISHOP,
APPELLEE.

PETITION FOR REHEARING

ROBERT H. McFARLAND
Attorney at Law
P. O. Box 445
Bay Springs, Mississippi

MAXEY, CLARK & CASEY
Attorneys at Law
P. O. Box 731
Laurel, Mississippi

IN THE SUPREME COURT OF MISSISSIPPI

CORAL DRILLING, INC., A CORPORATION,
AND ROBERT REEVES,
APPELLANTS,

versus NO. 46,600

CHARLES L. BISHOP,
APPELLEE.

PETITION FOR REHEARING

Comes now the Appellee in the above styled and numbered cause and petitions the Court for a rehearing of said cause and sets forth as its reasons therefor the following grounds:

I

The Court erred in adjudicating that two remedies have been pursued by Appellee in view of the Trial Court's decision that Appellee pursued a nonexistent remedy. The effect of such an adjudication is a denial of due process.

II

The Supreme Court has made an erroneous analysis of the facts causing it to reach a forced and unnatural conclusion that the Appellee made an election of remedies.

III

The action of the Mississippi Supreme Court, in reversing and rendering the decision of the Chancery Judge, has mistakenly but nonetheless arbitrarily, deprived the Appellee of the due process guaranteed by the several Articles of the United States Constitution.

IV

The Supreme Court erred in ignoring the findings of the Chancery Judge, based on the preponderance of the evidence that a mistaken remedy was initially pursued by Appellee without prejudice to Appellant and that, therefore, the theory of election of remedies was not applicable.

V

The Supreme Court erred in applying the doctrine of election of remedies to this case because there were not two actual remedies.

VI

The Appellee has been denied equal protection of the law by the Supreme Court in adjudicating that his answer to an interrogatory constituted an equitable estoppel.

VII

The Supreme Court erred in reversing and rendering the case as against Robert Reeves, one of the Appellants, who was found by the Chancery Judge to have been the party guilty of actionable negligence which resulted in the permanent personal injuries to the Appellee, who was not a party to the original suit, from which the Supreme Court drew its doctrine of election of remedies and judicial estoppel.

VIII

Appellee would further show that this case is of such grave import to the Appellee, who was rendered totally and permanently disabled, and to the laws of the State of Mississippi, as determined by judicial decisions, that this petition for rehearing should be heard by the Court in banc and, therefore, the Appellee respectfully requests a hearing in banc.

Respectfully submitted,

CHARLES L. BISHOP, Appellee

(Signed) GEORGE D. MAXEY
Of Counsel

(Signed) ROBERT H. McFARLAND
Of Counsel

APPENDIX NO. 6

IN THE SUPREME COURT OF MISSISSIPPI

DECISIONS HANDED DOWN JUNE 5, 1972

SUGG, J.

46,600 Coral Drilling, Inc., a Corp. & Robert Reev
v. Charles L. Bishop; Chancery, Jones; Pe
tion for Rehearing Denied.

ONLY CASES MARKED "X"
HAVE WRITTEN OPINIONS.

Respectfully submitted,
Julia H. Kendrick, Clerk
Yvonne Burnham, D. C.

LE COPY

S. CT. U.S.
FILED
SEP 25 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-358

CHARLES L. BISHOP,

Petitioner,

versus

CORAL DRILLING, INC., et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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Bay Springs, Mississippi 39422

ATTORNEYS FOR
RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-358

CHARLES L. BISHOP,

Petitioner,

versus

CORAL DRILLING, INC., et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Respondents pray that this court deny the Petition for Writ of Certiorari to the Supreme Court of Mississippi, wherein Petitioner seeks to review a decision entered on April 10, 1972.

OPINION BELOW

The opinion of the Supreme Court of Mississippi (A. 9a)[1] is reported at 260 So.2d 463. After the usual

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[1] "A" references are to pages of appendices attached to Petition; "Pet." refers to Petitioner's Petition and supporting brief page numbers. "Appendix" references are to pages of the appendices attached hereto, as certified from the Record by Certificate of the Clerk of the Supreme Court of Mississippi, also attached hereto.

time, plus a fifteen day extension, Petition for Rehearing (A.25a) was filed and later denied without written opinion on June 5, 1972 (A 29a). Under State Court Rule 14(c) (Appendix G), Respondents were not called upon to rely to the Petition for Rehearing.

JURISDICTION

The jurisdiction of this court is attempted to be involved under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I. Where the federal question is raised for the first time in a Petition for Rehearing addressed to the highest state court, charging by a mere reference that the court has deprived Petitioner of "due process guaranteed by the several Articles of the United States Constitution", without specifying any particular clause of the Constitution, where the case authority upon which the highest state court decision was based had been fully presented by Respondents to the trial court, where the said decision was not unexpected, and where the court denied the Petition for Rehearing without written opinion or any indication whatsoever that the federal question was considered or decided, is the federal question timely and properly raised in the state court?

II. Where no state or federal statute is involved, where no conflict of decisions exists among state and federal courts, where there is no question whatsoever of public importance or important principles of law,

but only private litigant interest in a personal injury damage suit tried without jury in an equity court selected by Petitioner who previously had received settlement consideration of $90,000 from the tortfeasor, Smith, Inc., in a law court in another county, is there any federal question that requires resolution by this court?

III. Where Petitioner collects $90,000 in settlement of a personal injury damage suit in a law court action in one county by alleging under sanctity of judicial oath that a red truck of the tortfeasor, Smith, Inc., hauling part of a derrick, hit a telephone wire upon which he was working, where, thereafter, he selects an equity court in another county, and changes his story by alleging under sanctity of judicial oath that the Respondent's blue truck, hauling a mud tank, hit the wire and caused the accident, and where the highest state court on appeal reverses and renders the case against Petitioner based on application of the doctrine of election of remedies, plus judicial estoppel, is the state court's decision so clearly correct and sustainable on independent grounds of state law as to preclude review by this court?

STATEMENT OF THE CASE

On December 13, 1969, Petitioner, Mr. Charles L. Bishop, filed suit against Smith, Inc., and Respondent Coral in the Circuit Court of Jasper County, Mississippi, alleging that the truck of Smith, hauling part of a derrick, hit the wire. On February 16, 1970, in response to Interrogatories propounded by Respondent

Coral (Appendix A), Petitioner furnished sworn Answers (Appendix B), and identified the large red truck as Smith's, and identified the only witness as Petitioner's foreman, Mr. Leo McDevitt, who, from time of accident through his testimony in trial court, stated consistently that he saw a red Smith truck cause the accident. The homeowner who arrived a few minutes later supported McDevitt's assertion which was made in the presence of Petitioner, but undenied by him. Respondent Coral was dismissed without prejudice on February 26, 1970 (Appendix C), and defendant Smith settled with and paid Petitioner $90,000 on March 5, 1970, after there was entered a Judgment Approving Third Party Payment (Appendix D) involving the employer, and its compensation carrier and protecting Petitioner on his future medical needs beyond $80,259.78, pursuant to the Mississippi Workmen's Compensation Act. Petitioner's original story identifying the Smith truck was ratified when he was hospitalized on May 26, 1969, during an interview with an adjuster for the compensation carrier for his telephone company employer. Next, on May 22, 1970, Petitioner filed suit under oath in equity against Respondents in the Jones County Chancery Court (Appendix E), wherein he swore that the Respondent's truck severed the wire. On the witness stand, his testimony followed the averments of the Bill of Complaint. According to Petitioner's fabrications there, Smith truck became Respondent truck; red truck became blue truck; derrick became mud tank. Otherwise, only improper inference pyramided upon inference supported Petitioner's changed story. In the trial court, Respondents cited *O'Briant v. Hull*, 208 So.2d 784 (A.7a) to the trial chancellor who

first found Respondents liable, then secondly took their Pleas in Bar as raising the defense of the doctrine of election of remedies, but overruled the Pleas and Motion to Dismiss, awarding Petitioner a monetary decree. In reversing and rendering for Respondents, the highest state court found that this case is controlled by *O'Briant*, supra, at page 465:

> "As succinctly stated in *O'Briant*, the difficulty here is that one action alleges what the other action denies, and the facts necessary to support one remedy are inconsistent with those necessary to support the other (208 So.2d at 787). *The case now before the court has an additional element not present in* O'Briant *in that Bishop, in the Chancery Court suit, swore to facts contrary to what he had sworn to in the former suit.* The two remedies Bishop sought to pursue are totally inconsistent; *either a Smith truck struck the wire, or a Coral truck struck it* . . . Courts will not permit litigants to solemnly affirm that a given state of facts exists from which they are entitled to a particular relief, and then afterwards affirm, or assume, that a contrary state of facts exist from which they are entitled to inconsistent relief." (A.14a). (Emphasis ours)

The court further found (A.15a) that Petitioner was judicially estopped to maintain the second suit because of proper regard for public policy that upholds the sanctity of an oath, stating at page 466:

> "Courts should of their own initiative preclude a party from repudiating in one suit a sworn statement made in support of former litigation."

Petitioner is clearly in error (Pet.3) that "Sometime after the accident it was discovered there was a Coral Drilling, Inc. truck in the caravan". On witness stand, Petitioner testified that he saw Respondent's truck hit the wire although that was diametrically opposed to everything that had been said on the subject up until his collection of $90,000. There was no discovery of any such alleged fact; only a change of story. Petitioner had one cause of action against the tortfeasor Smith whose truck caused the injury and he used his substantive right to elect and collect one time only from Smith.

REASONS FOR DENYING THE WRIT

I. The Federal Question Was Neither Timely Nor Properly Raised In The State Court

Under Rule 23(1)(f) here, Petitioner made no attempt whatsoever to explain how the federal question was timely and properly raised in the state court. The method Petitioner used was to raise it *first* in the highest state court by filing a Petition for Rehearing (Pet.4; A.25a) on May 9, 1972, after he was granted a 15 day extension (Appendix F). His filing occurred 30 days after the decision on April 10, 1972 (A.9a). Under Rule 14(c) (Appendix G), Respondents were not called upon by the court to reply to the Petition for Rehearing which was denied without written opinion on June 5, 1972 (A.29a). The federal question was never men-

tioned in the trial court, nor by cross-assignment of error [Appendix G. Rule 6(a)] at time of appeal from trial court to highest state court. The manner used was at the very last stage by Petitioner's accusing the court of depriving him of "due process guaranteed by the several Articles of the United States Constitution" (A.27a). These charges were too broad and non-specific to have any significance whatsoever. The first mention of the Fourteenth Amendment came in "Question Presented for Review" (Pet.2). Even then the provisions were not set out verbatim as required by Rule 23. The Mississippi case upon which the decision rested, *O'Briant v. Hull*, supra, (A.14a) was presented to and considered by the trial court (A.7a). The decision was neither unexpected nor a surprise, and, based on prior pertinent decisions, Petitioner is bound to have anticipated a federal question at the trial or appellate level, if one existed (which Respondents deny).

The litigant must follow state practice and procedure in raising the federal question (Appendix G). Any failure to do so may prove fatal to his chances for Supreme Court review. *In the Matter of Marshall Lamkin*, 355 U.S. 59 (1957). Care must be taken to make reference to the particular clause of the federal Constitution, as well as rights claimed thereunder. This court has held insufficient a mere reference to the "Constitution of the United States". *Herndon v. Georgia*, 295 U.S. 441 (1935); *Bilby v. Stewart*, 246 U.S. 255 (1918); *Forbes v. State Council of Virginia*, 216 U.S. 396 (1910); *Harding v. Illinois*, 196 U.S. 78 (1904); *F. G. Oxley Stave Company v. Butler County*, 166 U.S. 648 (1897). Raising the federal question for the first time in a petition for

rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *Herndon v. Georgia*, supra; *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); 36 *C.J.S.* 750; Sec. 274 (2). There must be language indicating that the federal question was considered and disposed of. The court must exert its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to original disposition. If reasonable state procedural requirements are not observed, this court will decline to exercise jurisdiction where the highest state court is completely silent on the federal question. *Mutual Life Insurance Co. v. McGrew*, 188 U.S. 291 (1903). In such an instance the court assumes that the silence is due to the procedural deficiency. *Bailey v. Anderson*, 326 U.S. 203 (1945). Under this state's practice, unless the federal question is raised in the trial court or discussed in the original opinion of the highest state court, it is too late to present it after the case has been decided. *National Mutual Building & Loan Asso. v. Brahan*, 193 U.S. 635 (1904); *Nickey v. Mississippi*, 292 U.S. 393 (1934); *Yazoo & M. V. R. Co. v. Adams*, 180 U.S. 1 (1901). Petitioner, having failed to raise the question at the outset, but only as an afterthought when he lost before the highest state court, finds that he is too late.

II. The Decision Presents No Federal Question That Requires Resolution By This Court

The actual, practical effect of this decision is that it has no important consequences for other litigants in

other situations. It simply is not a vital question and is not the sort of case to be reviewed by this court since contentions in the Petition are plainly insubstantial. It is essential to jurisdiction here that a substantial federal question be properly raised in the state court, and it must be more than a formal one. The concept of importance relates, of course, to the importance of the issues "to the *public* as distinguished from" importance to the particular parties involved. *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). *United States v. Johnson*, 268 U.S. 220 (1925).

Turning now to Petitioner's brief, wherein points of relevancy seem not to be reached, in "Statement of the Case" (Pet. 3) although Smith, Inc., specifically denied liability in the limited release and covenant (A.21a, which was not an exhibit, never before the court and is completely *outside the Record*), it was a self-serving document prepared expressly to enter suit against Respondents in the equity court. It is abundantly clear that the tortfeasor Smith would not have voluntarily paid $90,000 if it had not been convinced of its liability. The contentions about there being only one tortfeasor has nothing to do with the fact that Petitioner elected to swear and collect from Smith. In effect, one remedy and right was to go after the red truck company; the other remedy and right was to pursue the blue truck company. As pointed out in the decision, either one truck or the other hit the wire, and not both (A.14a). In the fourth paragraph (Pet.4), Petitioner misquoted the state court's grounds for its decision. It was the *compromise and settlement* of the first suit that constituted the election which precluded Petitioner from thereafter prosecuting an action based

upon a theory opposite and repugnant to that upon which the former action was maintained (A.14a). The court did not base its decision upon the mere bringing of a suit against Smith. With reference to the *Levy* and *Glona* cases (Pet.4), a wrongful death statute which classified illegitimates outside its provisions was held unconstitutional. In *Hansberry* (Pet.5) complainants simply were not parties to the prior class action, had no notice, and were held not to be bound thereby. The doctrine of election of remedies is distinguished from res judicata (Pet.5). 25 *Am.Jur.2d* 651; Sec. 6. *Bernstein* (Pet.5) held that the government's amendments of its complaint on more than one occasion before trial were not binding as an election of remedies. The *Henry* case (Pet.5) was a criminal matter involving civil rights which concerned the failure of defense counsel to make objection to introduction of illegal evidence. That type of procedural technicality was found to be insufficient to uphold a conviction. Petitioner did exercise his right to recover for negligent injury (Pet.5) by choosing his forum and settling with the tortfeasor Smith. Federal constitutional guarantees are not designed to protect the litigant who changes his story to advance his own monetary interest. Again, begging to differ, Petitioner did not mistakenly sue a non-tortfeasor, since Smith, as the identified tortfeasor, had a bona fide interest in getting discharged. The highest state court had every right to review the liability, vel non, of Respondents, and properly found for them. Petitioner asserted and pursued his remedy against Smith for almost a year before changing his story.

The case at bar is a prime example of the application of the doctrine of election of remedies. Petitioner was

not precluded from maintaining his action against Respondents merely because of the release, but rather because of his swearing to opposite and repugnant facts after having collected once. The concept of due process will not protect Petitioner who not only had his day in court, but several days in two courts of different kinds in two different counties. This case was decided upon election of remedies, not upon res judicata nor on the theory of joint tortfeasors. Due process and equal protection of law suggests that the relief afforded Respondents was eminently correct. Petitioner's contention that election of remedies is purely procedural is likewise erroneous since he had two remedies based on alternate substantive rights and he pursued one to a successful conclusion. 25 *Am.Jur.2d* 651; Sec. 7. *United States F. & G. Co. v. First Nat. Bank in Dallas,* 172 F.2d 258 (5 Cir. 1949). Technically, election of remedies might be procedural only at the time of filing suit and before his swearing to opposite stories, but Petitioner can scarcely contend that a substantial right election was not made upon compromise and settlement of the Circuit suit.

III. The Decision Below Is Clearly Correct And Can Be Sustained On Three Independent, Non-Federal Grounds Of State Law

This court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent non-federal ground. *Murdock v. Memphis,* 20 Wall. 590, (1875); *Fox Film Corp. v. Muller,* 296 U.S. 207 (1935). Therefore, if the federal question is not a substantial question, if it has not been timely and properly raised

in the state court, precluding the latter from being afforded an opportunity to consider and decide the question, and if the state court's judgment can be sustained on independent, non-federal grounds, then the certiorari jurisdiction is not exercised. This decision turns upon its own facts, and is correct without regard to the federal question sought to be raised by Petitioner. Clearly, election of remedies is the first non-federal ground (*O'Briant*, supra) (A.14a). When Petitioner secured $90,000 by swearing that a red Smith truck injured him (Appendix B), and then swearing later that a blue Coral truck was responsible (Appendix E), his testimony was opposite and repugnant, and he not only elected his remedy, but also his substantive rights to pursue the tortfeasor Smith, whom he identified up to the time of collection some eleven months after the accident. *Five* Justices of the highest state court (A.9a, 15a), reviewing as superior chancellors [*Gillis v. Smith*, 75 So. 451 (Miss. 1916) at page 456], reversed *one* trial chancellor, basing the decision principally on the case of *O'Briant*, supra, and the authorities therein discussed. The drastic story-changing of red truck to blue truck by Petitioner in an unsuccessful effort to secure compensation twice was repudiated by the state court whose decision is substantive, clearly correct and in accord with like situations that have arisen in other jurisdictions where the administration of justice would not allow what amounts to trifling and toying with the processes of the courts, and making a mockery of law. *Gohlinghorst v. Ruess*, 20 N.W.2d 381 (Neb. 1945); *Loomis v. Church*, 277 P.2d 561 (Idaho 1954); *Powell v. Schultz*, 118 S.W.2d 25 (Mo. 1938); *Watkins v. Norfolk & Western Ry. Co.*, 23 S.E.2d 621 (W. Va. 1942); *Michaelson v. Simula*, 250 N.W. 264 (Mich.

1933); *McAuslan v. Union Trust Co.*, 125 A. 296 (R.I. 1924).

Secondly, another independent, non-federal ground for upholding the decision (A.15a), is the doctrine of judicial estoppel (also known as estoppel by oath), which precludes a party from repudiating in one suit a sworn statement made in support of former litigation (Appendices A, B and E). *Great Southern Box Co. v. Barrett*, 94 So.2d 912 (Miss. 1957); *Clarke v. Ripley Savings Bank & Trust Co.*, 181 S.W.2d 386 (Tenn. 1943). In *Melton v. Anderson*, 222 S.W.2d 666 (Tenn. 1949), at page 669, the court referred to the judicial estoppel rule:

> ". . . As said, *the rule rests not upon prejudice to the individual, but prejudice to the administration of justice and hence to society, which would result if the litigant were allowed to obtain an advantage for himself*, or attempt to do so, by willfully swearing one thing one time, and obtain another advantage, or attempt to do so, by willfully swearing the opposite another time, with no explanation of the inconsistency and with the possibility of prevailing in both instances. *To countenance such a situation would be to regard with complacency a violation of the sanctity of the oath, and bring our system into disrepute.*" (emphasis ours)

A third, independent, non-federal ground supporting the salutary decision speaks loudly. After departing a (jury) law court in Jasper County where the acci-

dent occurred, Petitioner selected a (non-jury) equity court in Jones County, and voluntarily submitted his alleged claim to the application of equitable principles and maxims. Thus, he does not complain that his constitutional right of trial by jury has been abridged; rather, he charges the highest state court (A.27a), but not the Respondents, with depriving him of some still undefined federal constitutional rights because it reversed and rendered a clearly erroneous monetary decree to which he was not entitled after securing $90,000 from the tortfeasor Smith. "He who comes into *equity* must come with *clean hands.*" *Precision Instr. Mfg. Co. v. Automotive M. Mach. Co.*, 324 U.S. 806 (1945). Devious, deceitful and unconscionable conduct has been criticized by this court and other federal courts. *New York Football Giants v. Los Angeles Chargers Football Club*, 291 F.2d 471 (5 Cir. 1961). The conduct of the Petitioner in playing fast and loose with the processes of the court is offensive to the dictates of natural justice, and he should be held remediless in the state courts of equity. Respondents respectfully urge that no door-opening precedent be set here to allow personal injury damage claimants to burden this court with insubstantial petitions for writ where the highest state court is manifestly correct.

CONCLUSION

For the foregoing reasons, the Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

ERNEST W. GRAVES,
P. O. Box 2008
Gardiner Center Office Building
Laurel, Mississippi 39440

MARVIN OATES
P. O. Box 426
Bay Springs, Mississippi 39422
Attorneys for Respondents

September 22, 1972

CERTIFICATE OF SERVICE

I do hereby certify that on this the 22 day of September, A. D., 1972, three (3) copies of Brief for Respondents in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid to Mr. John R. Martzell, 1012 Richards Building, New Orleans, Louisiana 70112, and to Mr. Robert H. McFarland, P. O. Box 445, Bay Springs, Mississippi, and to Messrs. Maxey, Clark and Casey, P. O. Box 731, Laurel, Mississippi, attorneys for the Petitioner. I further certify that all parties required to be served have been served.

Ernest W. Graves
P. O. Box 2008
Gardiner Center Office Building
Laurel, Mississippi 39440
Counsel for Respondents

IN THE
SUPREME COURT OF MISSISSIPPI

CORAL DRILLING, INC., ET AL.,
Appellant,

VS.

CHARLES L. BISHOP,
Appellee.

No. 46,600

CERTIFICATE

I, Julia H. Kendrick, Clerk of the Supreme Court of Mississippi, do hereby certify that the following Appendices are true and correct copies of pages (designated R. ____), or exhibits, or parts thereof, of the official Record in the above styled cause, now on file in my office at Jackson, Mississippi, to-wit:

Notice and Interrogatories - R.319 (Exhibit 8)
Answers to Interrogatories - R. 319 (Exhibit 8)
Order Dismissing Defendant, Coral Drilling, Inc. Without Prejudice - R. 94 (General Exhibit 6)
Judgment Approving Third Party Payment - R.92 (General Exhibit 5)
Bill of Complaint - R. 4

I do further certify that the attached copy of that certain letter from me to Hon. Robert H. McFarland dated April 17, 1972, concerning the grant of fifteen

(15) additional days in which to file a Petition for Rehearing in this cause, is true and correct.

I do further certify that the attached copy of Rule 6(a), Rule 7(a) and Rule 14 of the Mississippi Supreme Court Rules, is true and correct, and the said Rules have been in full force and effect since their adoption on December 20, 1967.

WITNESS MY HAND AND OFFICIAL SEAL on this the 7th day of September, A. D., 1972.

/s/ JULIA H. KENDRICK
JULIA H. KENDRICK, CLERK,
SUPREME COURT OF
MISSISSIPPI

(SEAL)

Appendix A

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL DISTRICT
OF JASPER COUNTY, MISSISSIPPI

CHARLES L. BISHOP,

Plaintiff,

VS.

G. B. "BOOTS" SMITH, INC., ET AL.,

Defendants.

NO. 1666

NOTICE AND INTERROGATORIES

TO: CHARLES L. BISHOP, PLAINTIFF:

Please take notice that your testimony, under oath, is desired, and that the following interrogatories are propounded pursuant to the provisions of Section 1712, Mississippi Code Annotated, 1942, as amended, to-wit:

• • •

INTERROGATORY NO. 24

If the plaintiff knows, please identify the names and addresses of all witnesses to the alleged accident involved in this litigation.

• • •

INTERROGATORY NO. 31

If the plaintiff knows, please identify the size, color, dimensions and character of the load on the large

truck and trailer owned by the defendant, G. B. "Boots" Smith, Inc., which caused the wire to be severed.

INTERROGATORY NO. 32

As alleged in the Declaration, if the plaintiff knows, please identify the color and type of large truck and trailer owned by the defendant, G. B. "Boots" Smith, Inc.

• • •

Please answer under oath the following interrogatories within thirty (30) days after the service hereof, or be subject to the penalties provided by law.

CORAL DRILLING, INC.,
Defendant
By: /s/ Ernest W. Graves
Of Counsel

GIBBES AND GRAVES
Attorneys at Law
The Gardiner Center Offices
Laurel, Mississippi

CERTIFICATE

I, Ernest W. Graves, of counsel for the defendant, Coral Drilling, Inc., do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Notice and Interrogatories to Robert H. McFarland, Esquire, attorney for plaintiff, and to John Roach, Esquire, of the firm of Daniel, Coker, Horton and Bell, attorneys for the defendant, G. B. "Boots" Smith, Inc., at their respective business addresses.

This the 3rd day of February, A. D., 1970.

/s/ Ernest W. Graves

STATE OF MISSISSIPPI
COUNTY OF JASPER

I, V. H. Hosey, Circuit Clerk in and for said County, do hereby certify the foregoing is a true and correct copy of the original as same appears on record in my office in Bay Springs, Mississippi.

Given under my hand and seal of office on this the 15th day of July, 1970.

/s/ V. H. Hosey, Circuit Clerk

(SEAL)

Exhibit 8
R. 319 (1, 4, 5)

Appendix B

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL DISTRICT OF JASPER COUNTY,
MISSISSIPPI

CHARLES L. BISHOP,
Plaintiff,

VS. NO. 1666

G. B. "BOOTS" SMITH, INC., ET AL.,
Defendants.

ANSWERS TO INTERROGATORIES

Comes now Charles L. Bishop, the plaintiff, and answers interrogatories filed in said cause as follows:

• • •

24. Leo McDevitt.

• • •

31. Unknown.
32. A large red truck.

• • •

/s/ Charles L. Bishop
PLAINTIFF

STATE OF MISSISSIPPI
COUNTY OF JASPER

Personally appeared before me the undersigned authority in and for the County and State aforesaid, Charles L. Bishop, who being by me first duly sworn, states on his oath that the matters of fact and averments contained in the foregoing answers are true and correct as therein stated.

/s/ Charles L. Bishop

Sworn to and subscribed before me on this the 16th day of February, 1970.

/s/ Violet R. Wilson
Notary Public

(SEAL)

My comm. expires:
Feb. 13, 1972

STATE OF MISSISSIPPI
COUNTY OF JASPER

I, V. H. Hosey, Circuit Clerk in and for said County, do hereby certify that the foregoing is a true and correct copy of the original as same appears on record in my office.

Given under my hand and seal of office on this the 10th day of July, A. D., 1970.

/s/ V. H. Hosey, Circuit Clerk

(SEAL)

FILED:
Feb. 16, 1970
/s/ V. H. Hosey
Circuit Clerk

Exhibit 8
R. 319 (6, 7, 8, 9)

Appendix C

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT OF JASPER COUNTY, MISSISSIPPI

FEBRUARY 1970 TERM.

CHARLES L. BISHOP,

Plaintiff,

VS. NO. 1666

G. B. "BOOTS" SMITH, INC., ET AL.,

Defendants.

ORDER DISMISSING DEFENDANT, CORAL DRILLING, INC. WITHOUT PREJUDICE

On motion of plaintiff, it is hereby ordered and adjudged that this case be, and the same is hereby, dismissed without prejudice as to defendant, Coral Drilling, Inc., at cost of plaintiff.

So ORDERED and ADJUDGED On this the 26th day of February, 1970.

/s/ Joe A. McFarland, Jr.
CIRCUIT JUDGE

FILED FEB. 26, 1970,
V. H. HOSEY, CIRCUIT CLERK,
BY: Dorothy L. Hosey, D. C.

STATE OF MISSISSIPPI,
COUNTY OF JASPER

I, V. H. Hosey, Circuit Clerk in and for said County, do hereby certify that the foregoing is a true and correct copy of the original as same appears on record in my office in Bay Springs, Miss.

Book No. 7 Page 165

Given under my hand and seal of office this the 27th day of Feb. 1970.

V. H. Hosey, Circuit Clerk
/s/ Dorothy L. Hosey, D. E.

General Exhibit 6
R. 94

Appendix D

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL DISTRICT OF
JASPER COUNTY, MISSISSIPPI
FEBRUARY 1970 TERM

CHARLES L. BISHOP,

Plaintiff,

VS. NO. 1666

G. B. "BOOTS" SMITH, INC.,

Defendant.

JUDGMENT APPROVING THIRD
PARTY PAYMENT

This cause having come on this date for hearing on the petition for approval of a third party settlement and payment, duly sworn to and verified by all parties, and the parties having appeared in open Court by their respective attorneys, and having announced that the plaintiff and intervenors have agreed to accept a certain sum of money upon the approval of this Court for a final resolution of all litigation and claims against the defendant, G. B. "Boots" Smith, Inc., and praying the Court to approve such agreement, and the Court having fully examined the said matters and being now fully advised in the premises, does find and order and adjudge as follows:

1. The Court finds that the said petition was filed under the terms of Section 30 of the Mississippi Work-

men's Compensation Act, as amended, being Section 6998-36 of the Mississippi Code of 1942, Annotated, Recompiled 1956, and other applicable provisions thereof, and that this Court has full and complete jurisdiction of the parties and of the subject matter herein. That Charles L. Bishop received serious accidental injuries on or about March 31, 1969, at a location near Bay Springs, Second Judicial District of Jasper County, Mississippi, along Mississippi State Highway No. 528 at a time when the said Charles L. Bishop was replacing a telephone line across the said highway and was then and there on and about the course and scope of his employment, and was then and there in the employment and on and about the business of the said Bay Springs Telephone Company; that at such time, a truck hauling part of an oil drilling rig struck and broke the said telephone line, and the plaintiff and claimant, Charles L. Bishop, thereby was caused to fall to the ground from his position on the telephone pole, a distance of about 20 feet, after having been knocked unconscious by the said impact of the pole; that, in such accident, the said Charles L. Bishop received extensive and severe permanent injuries including but not limited to, fractures of his thoracic and cervical spine, pulled muscles and ligaments of his back and neck, shock to his nervous system, and great and excruciating pain of mind and body; that the claimant has thereby been permanently and totally injured and disabled in that his spine and spinal cord was broken, bruised, and severed, and that he is and will continue to be for the remainder of his entire life paralyzed from about his chest area down through and including his abdomen, lower body and both legs; that the said Charles L. Bishop was rendered thereby a

permanent paraplegic without any control or sensation of his body from about his chest down through and including his abdomen, lower body, and both legs; that the claimant has incurred since the time of the accident and will continue to incur for the remainder of his life, extensive medical care, hospitalization, treatment by physicians, medicine and drug expenses, and other related care and treatment expenses; that the claimant, Charles L. Bishop, requires constant care and treatment because of said injuries and that he will never again be able to work at any gainful occupation. That the said Charles L. Bishop contends and has contended that he is permanently and totally disabled from and after the date of the said accident, for his entire lifetime, under the law and especially under the Mississippi Workmen's Compensation Act, as amended.

2. The Court further finds that on the date of the accident, Charles L. Bishop was in the employment and on and about the course and scope of his employment with the Bay Springs Telephone Company, and that the said employer had in force and effect for the said Bishop and its employees, workmen's compensation insurance coverage with Fidelity and Guaranty Underwriters, Inc., according to the Mississippi Workmen's Compensation Act, as amended. That the said insurance carrier proceeded to pay and discharge its duties under workmen's compensation coverage and that, as of February 2, 1970, the said insurance carrier had paid the sum of $1,760.00 for disability compensation payments for the period March 31, 1969, through February 2, 1970, for a period of forty-three weeks; that such disability compensation payments have continued until the date of the filing hereof, and that said dis-

ability payments total the sum of $1920.00 as of the date of the filing hereof; that the said insurance carrier has also paid medical expenses for and on behalf of the said plaintiff in the total sum of $7,498.38 as of January 27, 1970, and that such medical expenses of the present date hereof total the sum of $7,820.22; that the said insurance carrier has intervened herein and is entitled to reimbursement under the Mississippi Workmen's Compensation Act against any settlement herein in the present total sum of $9,740.22 for any and all type benefits furnished. That, as to any recovery herein received by the said Bishop, the insurance carrier is entitled to an order suspending any and all benefits owed by it under the Mississippi Workmen's Compensation Act, as amended, and that such insurance carrier should be relieved of any duty for any benefits to the extent of the recovery collected herein by the said Charles L. Bishop.

3. The Court further finds that it has not been legally or judicially determined as to what company or party was responsible for or caused the said accident, and that this is a case of disputed liability, and that the said defendant has denied and continues to deny any liability in the premises, but that by the petition herein, the said defendant recognizes the severity and permanent nature of the injuries to the plaintiff and because of the uncertainty of litigation, the defendant has offered to pay the total sum of Ninety Thousand and no/100 Dollars ($90,000.00) to purchase its peace in the premises and to bring an end to any and all litigation or claims made against it by all parties having claims and in order to cease any and all suits or claims that may be made against it. That,

of the total sum of Ninety Thousand and no/100 Dollars ($90,000.00), the amount of $28,000.00 should be awarded to the Honorable Robert McFarland for his legal services rendered to the plaintiff in the premises; that the amount of $9,740.22 should be paid to the workmen's compensation insurance carrier for reimbursement, and that the workmen's compensation insurance carrier should be relieved of further liability to Charles L. Bishop to the extent of the sum of $80,259.78 and that the sum of $52,259.78 should be awarded to the said Charles L. Bishop and related claimant as a full and final purchase of peace between the parties, and as a full and final ending of any and all litigation and claims against the said G. B. "Boots" Smith, Inc., and its agents and employees. The Court further finds that the amount paid to the said attorney is a reasonable cost of collection and hereby approves the same as costs of collection; the Court further finds that the entire proposal is fair, just, and to the best interest of the plaintiff as between the parties presently in litigation in this suit as of the date hereof.

IT IS, ACCORDINGLY, ORDERED AND ADJUDGED, that the defendant, G. B. "Boots" Smith, Inc., pay to Charles L. Bishop the sum of $52,259.78 as a full and final and complete purchase of its peace and in discharge of any and all litigation and suits against the said defendant by the said Charles L. Bishop, his related claimants, and that the Honorable Robert McFarland receive the additional sum of $28,000 for his attorney's fee for reasonable cost of collection; that the intervenor receive the sum of $9,740.22 for its reimbursement; and that the intervenor is further relieved and discharged of any further liability to Charles

L. Bishop to the extent of $80,259.78 because of the payment herein; that the parties and related claimants execute any and all acquittances, discharges, or other instruments which may be required and proper to complete the purposes herein; that a certified copy of this judgment, together with such other papers as may be necessary and proper, be filed with the Mississippi Workmen's Compensation Commission; and that this cause be and the same is hereby dismissed with prejudice as to the defendant G. B. "Boots" Smith, Inc. and any and all of its agents, servants, employees and drivers at the time of the accident and employed during March, 1969, through and including the first week of April, 1969, and especially March 31, 1969, at the cost of the defendant, G. B. "Boots" Smith, Inc., for which let execution issue.

ORDERED AND ADJUDGED on this the 5 day of March, 1970.

(Signed) JOE A. McFARLAND, JR.
CIRCUIT JUDGE

APPROVED AND AGREED TO:

/s/ ROBERT McFARLAND
ROBERT McFARLAND, Attorney
for Charles L. Bishop

/s/ MATTHEW HARPER, JR.
MATTHEW HARPER, Attorney for
Intervenor

/s/ JOHN M. ROACH
JOHN M. ROACH, Attorney for
G. B. "Boots" Smith, Inc.

Filed: March 5, 1970

STATE OF MISSISSIPPI,
COUNTY OF JASPER

I, V. H. Hosey, Circuit Clerk in and for said County, do hereby certify that the foregoing is a true and correct copy of the original as same appears on record in my office in Bay Springs, Miss.
Book No. 7 Page 180
Given under my hand and seal of office this the 5th day of March, 1970.

/s/ V. H. HOSEY
Circuit Clerk

General Exhibit 5
R-92 (1-6)

Appendix E

IN THE CHANCERY COURT FOR THE
FIRST JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

CHARLES L. BISHOP
Complainant,

VS. NO. 6312

CORAL DRILLING, INC., A CORPORATION,
AND ROBERT REEVES,
Defendants.

• • •

BILL OF COMPLAINT

Comes now Charles L. Bishop, an adult resident citizen of the State of Mississippi, and complains jointly of Coral Drilling, Inc., a corporation, and Robert Reeves, defendants, and the Loffland Brothers Company, a Texas corporation, The Louisiana Land and Exploration Company, a Maryland corporation, the Chevron Oil Company, a California corporation, and the Shell Oil Company, a Delaware corporation, garnishee-defendants, and in support thereof, would respectfully show unto the Court the following facts, to-wit:

• • •

I.

That the defendant, Coral Drilling, Inc., a foreign corporation, qualified to do business within the State of Mississippi, has designated the CT Corporation System, 118 North Congress Street, Jackson, Mississippi, as its registered agent for process.

II.

That the aforesaid defendants, Coral Drilling, Inc., a corporation, and the defendant, Robert Reeves, a resident of the First Judicial District of Jones County, Mississippi, are jointly indebted to the complainant in the manner hereinafter mentioned.

• • •

V.

Complainant would further show that at all times herein complained of the defendants, Coral Drilling, Inc., a corporation and Robert Reeves, were operating a heavily loaded truck-tandem float and at such times the defendant, Robert Reeves, was driving said truck and was acting as the agent, servant and employee of the corporate defendant, Coral Drilling, Inc., a corporation, within the scope of his employment and in the furtherance of the business of this corporate defendant.

VI.

That on or about March 31, 1969, at approximately 10:15 a.m., the defendant, Coral Drilling, Inc., a corporation, owned and was operating, by its employee, the

aforesaid defendant, Robert Reeves, a large truck-tandem float eastward on Highway No. 528 in Jasper County, Mississippi. That at all times herein complained of the driver of said truck-tandem float was the agent and servant of the corporate defendant, Coral Drilling, Inc., a corporation, and was acting in the scope of his authority and in the furtherance of his master's business. That the truck-tandem float was then transporting oil well drilling equipment, and that the height of the load was in excess of and in violation of the law of the State of Mississippi regarding heights of laden motor vehicles and that on said date and at said time the complainant herein, who was then in the employ of the Bay Springs Telephone Company, was in the act of replacing a telephone line across said Highway No. 528 at a point approximately two miles east of the corporate limits of the Town of Bay Springs, Mississippi. The complainant had stretched the said telephone wire from pole to pole across said highway and was in the act of securing it to one of the poles when the defendant, Robert Reeves, in his capacity as aforesaid, without keeping the said unlawfully laden truck-tandem float under reasonable and easy control and without keeping a proper lookout, on and along said highway, for obstructions, objects and/or persons, including your complainant, and while operating said vehicle at a dangerous and excessive rate of speed, negligently drove a portion of the drilling equipment being then and there transported by said unlawfully laden vehicle into the said wire causing same to be severed. That the pull of the wire caused the pole to which it was attached and on which the complainant was working at the time, to give or bend toward the center of the road. When the pole snapped back to an upright

position it struck the head of the complainant, rendering him unconscious and causing him to fall to the ground from a height of approximately twenty feet and causing the complainant to suffer severe and permanent injuries to his person as hereinafter set forth.

VII.

Complainant would show unto the Court that as a direct and proximate result of the joint, concurrent and gross negligence of the defendants, as aforesaid, the complainant was caused to suffer the following painful, permanent and serious injuries, sufferings, losses and damages:

* * *

VIII.

Complainant further prays that your complainant may be awarded a decree against the defendants, Coral Drilling, Inc., a corporation, and Robert Reeves, in the sum of $500,000.00, together with all costs herein expended.

* * *

Now, if your complainant has prayed for the wrong, improper or insufficient relief then your complainant prays for general relief and all proper relief.

Respectfully submitted,

(Signed) CHARLES L. BISHOP
CHARLES L. BISHOP,
Complainant

STATE OF MISSISSIPPI
COUNTY OF JASPER

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, CHARLES L. BISHOP, Complainant, who having been by me duly sworn, on his oath states that the matters and facts set forth in the above and foregoing Bill of Complaint are true and correct as therein stated, save those things stated on information and belief, and that these matters the said affiant verily believes to be true.

(Signed) CHARLES L. BISHOP
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME this the 21st day of May, A.D., 1970.

(Signed) VIOLET R. WILSON
NOTARY PUBLIC

My Commission Expires:
Feb. 13, 1972

Filed: May 22, 1970

LEONARD B. CAVES
Chancery Clerk
Jones County, Mississippi
R-4, 5, 7, 8, 9, 11, 12

Appendix F

April 17, 1972

Hon. Robert H. McFarland
Attorney at Law
P. O. Box 445
Bay Springs, Miss. 39422

Re: Coral Drilling, Inc., et al.
#46,600 vs.
Charles L. Bishop

Dear Mr. McFarland:

This is to notify you that your request for fifteen additional days in which to file a petition for rehearing in the above styled and numbered cause has been granted. Your petition for rehearing will be due on May 10, 1972.

Yours truly,
(Mrs.) Julia H. Kendrick
Supreme Court Clerk

dcb

cc: Messrs. Maxey, Clark & Casey
Attorneys at Law
P. O. Box 731
Laurel, Mississippi 39440

Messrs. Gibbes, Graves, Mullins & Bullock
Attorneys at Law
P. O. Box 2008 Choctaw Station
Laurel, Mississippi 39440

Hon. Marvin Oates
Attorney at Law
P. O. Box 25
Bay Springs, Miss. 39442

Appendix G

RULES OF SUPREME COURT OF MISSISSIPPI

Rule 6

ASSIGNMENTS OF ERROR

(a) The appellant shall file an assignment of error on or before the due date of appellant's brief, as provided infra in Rule 7, Subsection (a). The assignment of errors shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.

* * *

Rule 7

BRIEFS

(a) Immediately upon receipt of the record, and for the convenience of attorneys, the Clerk shall notify counsel of the filing of the record and the due date of

briefs in accordance with this rule. However, failure of the Clerk to give or of a party to receive notice of the filing of the record shall not excuse any delay in filing briefs.

Appellant's brief shall be filed not later than forty (40) days after the date the record is filed in the office of the Clerk of this Court.

Appellee's brief shall be filed not later than sixty (60) days from the date the record is filed in this Court, and any rebuttal brief of appellant shall be filed not later than seventy (70) days after the record is filed herein. An original and five copies of all briefs shall be filed with the Clerk. The certificates of appeal required in criminal cases under Mississippi Code 1942 Annotated sections 1182-1184 (1956) shall not affect the due dates of briefs in all cases, civil and criminal, which shall be as stated above.

Each case shall be considered at issue after the due date for filing of briefs has expired, and is thereafter subject to being set for oral argument and submission at any time in the discretion of the Court in accordance with Rule 9.

If the appellant fails to file his brief within the time herein required, his case shall be dismissed on motion of appellee or on the Court's motion; and any case so dismissed shall not be reinstated except as provided by Rule 18. If the appellee fails to file his brief within the time herein required, such brief shall be stricken from the record on motion of appellant or on the Court's motion. For the purpose of enforcing the foregoing, the

Clerk shall advise the Court of any delinquency in filing briefs.

* * *

Rule 14

PETITION FOR REHEARING

(a) Within fifteen (15) days after a decision is handed down on the merits of a case or on a motion, any party asserting that an error of law or fact was committed may file a written petition for rehearing. A petition for rehearing shall be typed or printed according to the provisions of Rule 7(c), shall be submitted with five copies, and shall briefly and distinctly set forth its grounds. The petition for rehearing shall be accompanied by a brief in support thereof, and shall set forth that a copy of such petition for rehearing and brief have been served upon opposing counsel. A petition for rehearing and brief in support thereof together shall not exceed twenty-five (25) pages.

(b) An adjournment of Court less than fifteen (15) days after the rendition of a judgment shall not preclude the filing of a petition for rehearing therein, but the same may be filed with the Clerk within the time prescribed for presenting such petition for rehearing to the Court, whereupon all proceedings on the judgment shall be stayed until it shall be acted upon at the next session of the Court, unless a majority of the Judges of the Court shall certify in writing to the Clerk prior to the next term that they have considered the petition for rehearing and have determined to overrule

it; upon receipt of such certificate such proceedings shall be had as if a petition for rehearing had not been filed.

(c) No reply to a petition for rehearing shall be filed, unless the Court shall call therefor. But no petition for rehearing will be sustained to the prejudice of the adverse party until he has been given an opportunity of replying thereto. After a petition for rehearing has been sustained, or overruled, by the Court, no further petition for rehearing shall be filed by any party.

(d) Any petition for rehearing containing language showing disrespect or contempt for this Court will be stricken from the files, and the Court will take such further action relative thereto as it may deem proper.